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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5563

BRIAN KEITH BALDWIN, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

BRIAN KEITH BALDWIN, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Brian Keith Baldwin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on June 1, 1979.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, reported at 372 So.2d 32, is attached hereto as Appendix A. The Alabama Court of Criminal Appeals' opinion, reported at 372 So. 2d 26, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on June 1, 1979. A timely Application for extension of the time in which to file petition for writ of certiorari from this Court was filed, and on August 20, 1979 the time for filing this petition was extended to and including October 29, 1979 by Order of Justice Lewis F. Powell, Jr.

QUESTIONS PRESENTED

(1) Whether petitioner's death sentence deprives him of life without due process of law, or denies him the equal protection of the laws, in violation of the Fourteenth Amendment, or constitutes cruel and unusual punishment in violation of the Eighth Amendment, because it was imposed pursuant to Alabama's post-Furman, pre-Gregg enactment governing capital prosecution and sentencing, which has the following features:

(a) Lesser included offenses, although supported by the evidence, cannot be submitted to the jury in a criminal prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether;

(b) Juries in capital cases are compelled to impose a death sentence upon every defendant found guilty of a capital crime without considering mitigating circumstances;

(c) The defendant's only outlet from this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict hearing and considering, inter alia, "the fixing of the punishment at death by the jury."

(d) The statutory aggravating circumstances include "especial heinousness," a criterion which has been found in as many as four-fifths of all cases where the death penalty is imposed;

(e) The provisions for appellate review do not empower appellate courts to vacate disproportional or excessive death sentences, and systematic comparative review in fact is not being performed;

(f) The various elements of this statute operate in tandem to compound its constitutional flaws.

(2) Whether petitioner's death sentence deprives him of life without due process of law, or constitutes cruel and unusual punishment, because of the limitation on mitigating factors which is imposed by the statute, either on its face or as applied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Alabama's death penalty statute, which are reproduced in Appendix D.

STATEMENT OF THE CASE

The evidence at trial demonstrated the following principal facts: On November 25, 1976, petitioner, Brian Keith Baldwin, and another youth, Edward Horsley, escaped from a North Carolina prison camp. Naomi Rolon, a 16-year-old girl, picked them up hitchhiking that night. They took control of her car. Subsequently she may have been raped. Horsley and petitioner stripped her of most of her clothing, attempted to kill her, and locked her in the trunk of the car. They then drove to Atlanta, and on the following day proceeded to Camden, Alabama. There, petitioner stole a pickup which contained a hatchet. In an isolated spot. Ms. Rolon was removed from the trunk of the car. After Horsley, driving the car, ran into her, petitioner struck her with the hatchet, inflicting a fatal wound. Horsley and Baldwin were later arrested in Lanett, Alabama, in the stolen truck.

Petitioner was tried under Alabama's post-Furman,[1] pre-Gregg,[2] death penalty statute, Ala. Code §§ 13-11-1 through 13-11-9 (1975). Trial lasted two days (August 8 and 9, 1977).

Petitioner testified in the course of the presentation of the state's case, to contest the voluntariness of his confession. At the close of the prosecution's case, the defense rested, not putting on any evidence. The jury found the petitioner guilty and returned a guilty verdict phrased as the trial judge had instructed:

> We, the jury, find the defendant guilty as charged in the indictment and fix his punishment at death by electrocution.

(R. 248; see R. 247)[3]

1/ Furman v. Georgia, 408 U.S. 238 (1972).

2/ Gregg v. Georgia, 428 U.S. 153 (1976).

3/ References to "R" are to the record on appeal in the state courts.

On September 9, 1977, the trial judge held a post-verdict sentencing hearing. The state relied on the evidence at trial, but supplemented it with three items: the statement of the co-indictee, Edward Horsley; petitioner's juvenile record; and petitioner's adult criminal record. (R.252-53). The following interchange then occurred:

> THE COURT: Mr. Owens [trial counsel for petitioner], do you have any mitigating circumstances which you would like to offer to the court at this time?
>
> MR. OWENS: Judge, I think perhaps I ought to in view of the gravity of the situation--put the defendant on the stand and see if I can elicit any mitigating facts from him. I don't have any particular thing in mind but I think perhaps I ought to give him an opportunity to give any circumstances that might be of any benefit to him and I think that the only way to do that is just put him on the stand.

(R.254). Petitioner then testified, principally concerning his own earlier life. His testimony demonstrated an extremely difficult family background, (see, e.g., R.254-57) and also raised the possibility that petitioner was on drugs at the time that Ms. Rolon died (R.258). His counsel indicated he had been handicapped in preparing for the sentencing hearing by the petitioner's family's failure to respond to his inquiries (R.263-64).

The court accepted "the death penalty as fixed by the jury" (R.270). As Alabama law directs, Ala. Code § 13-11-4 (1975), the court identified aggravating and mitigating circumstances. The sole mitigating circumstance which it found was the defendant's age. There were five aggravating circumstances: (1) that the crime had been committed while petitioner was under sentence of imprisonment in North Carolina, from which he had escaped; (2) that the defendant had previously pled guilty to a felony in North Carolina, which involved the use of violence; (3) that the defendant was previously charged

in the state of North Carolina with kidnapping and rape, which were disposed of by an adjudication of delinquency for assault with intent to commit rape; (4) that the capital felony was committed in the commission of robbery or flight after robbery; and (5) that the capital felony was especially heinous or atrocious or cruel. (R.268-70; 308-09). The court concluded without further explanation that "the aggravating circumstances far outweigh the mitigating circumstances." (R.270; 310).

On October 7, 1977, petitioner moved for a new trial on several grounds, including "that the Alabama capital sentencing procedures are violative of the Eighth and Fourteenth Amendments to the United States Constitution because they fail to assure that the death penalty will not be imposed in an arbitrary or capricious manner and do not comport with due process." This motion was "overruled and denied" on November 4, 1977.[4/] On October 3, 1978, the Alabama Court of Criminal Appeals affirmed petitioner's conviction. The court first considered the question of whether the state courts had jurisdiction to try petitioner for the capital offense of robbery and intentional killing, rather than simply for homicide, since the robbery was consummated in North Carolina. Acting pursuant to Alabama's Automatic Appeal Statute, Ala. Code § 12-22-241 (1975), the court also reviewed, inter alia, "the aggravating and mitigating circumstances set out in the record and the trial court's findings relative to those circumstances." It expressly held that "Alabama's capital felony act...fully comports with Lockett v. Ohio, 438 U.S. 586 [1978]... and that there was "no error on the part of the trial court in reaching the conclusion that the aggravating circumstances far outweigh the mitigating circumstances in this case." 372 So. 2d at 32. On certiorari (which is automatic in death cases, pursuant to Alabama Rules of Appellate Procedure Rule 39(c)) the Alabama Supreme Court's opinion addressed only the

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4/ A copy of this motion, with the court's notations of its action, is attached as Appendix C.

question of whether the state courts had jurisdiction to try the offense. In addition, since the state Supreme Court has the power and the duty to reverse plain errors of law on certiorari, see Boykin v. Alabama, 395 U.S. 238, 241-42 (1969); cf. Evans v. State, 361 So. 2d 666, 668 (Alabama. 1978) (Beatty, J., dissenting), cert. denied, 59 L.Ed. 2d 486 (1979), the constitutionality of the death penalty statute was drawn in question before this Court as well. With one judge dissenting, and a second concurring in the result, the state Supreme Court affirmed the conviction on June 1, 1979. Present counsel, who assumed representation of petitioner following the affirmance, filed a motion for suspension of the rules, so as to extend the time to file a petition for rehearing and supporting brief, on June 14, 1979. This motion was denied on June 19, 1979.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

As indicated in the preceding section of this petition, the constitutionality of Alabama's death penalty statute was explicitly raised in the trial court by motion for new trial. On appeal, the Court of Criminal Appeals addressed and upheld the constitutionality of the statute, and approved the sentencing decision in this case. Though the Supreme Court did not discuss the constitutional issues raised herein, they were necessarily before it, because of that Court's power and duty to review plain errors of law.

REASONS FOR GRANTING THE WRIT

I. Alabama's Statutory Death-Sentencing Procedure Raises Substantial and Literally Vital Federal Constitutional Questions, For Its Provisions Are Inconsistent With The Applicable Capital Punishment Decisions of This Court

A. Alabama's Unique Statutory Prohibition, Which Precludes Juries In Capital Cases From Considering Factually Established

Lesser Included Offenses, Raises Substantial Questions Under the Due Process and Equal Protection Clauses and the Eighth Amendment

The submission to the jury of lesser included offenses that are supported by the evidence is a commonplace of American criminal jurisprudence. Alabama's criminal law is no exception. As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged. Ala. Code § 15-17-1 (1975). This principle is extremely vital in the realm of murder where, by statute, an Alabama court is required in every case to charge on both first and second degree murder.[5/] Ala. Code § 13-1-73 (1975). The court is required to charge on other lesser degrees of homicide "if there is any reasonable theory from the evidence which would support the position." Fulghum v. State, 291 Ala. 7, 277 So.2d 886 (1973).[6/]

As the Court is aware, however, the Alabama death penalty statute expressly precludes the trial jury from considering lesser included offenses that can factually be found in a capital case. Ala. Code § 13-11-2(a) (1975). It thereby foists upon a jury that believes that the defendant has committed some degree of criminally culpable homicide -- but not capital homicide -- the Hobson's choice of acquitting a killer or convicting and subjecting to death an individual who is not guilty beyond a reasonable doubt of the only crime on which the jury can render a verdict.

5/ Under Alabama law, first degree murder is "wilful, deliberate, malicious and premeditated killing." All other common law murder is murder in the second degree. Ala. Code § 13-1-70 (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than 10 years. Ala. Code § 13-1-74 (1975).

6/ In Alabama, the other degrees of homicide are manslaughter in the first degree and manslaughter in the second degree. Ala. Code § 13-1-90 (1975). Whether a homicide amounts to murder in the first degree, murder in the second degree, manslaughter or self-defense "is always a question of fact for the jury, under proper instructions of the court." Warren v. State, 197 Ala. 313, 72 So. 624 (1916).

Aside from the quandary in which it places juries, the most striking feature of the lesser included offense provision of Alabama's capital statute is its uniqueness -- not only to Alabama law, but also to the criminal law of the remaining 49 states and the federal government.

This Court has recently granted certiorari to review the constitutionality of this feature of the Alabama death penalty statute. The question to be decided in Beck v. Alabama, 365 So. 2d 1006 (Ala. 1978), cert. granted, 26 Cr.L. 4052 (October 9, 1979), appears to present an as-applied issue, the constitutionality of the operation of this statute where the evidence would have supported a verdict on a lesser-included offense.

The concerns which justified grant of certiorari on the as-applied issue, however, equally justify grant of certiorari to consider whether the preclusion of lesser-included-offense charges results in the facial invalidity of this statute. The reasons for entertaining a facial attack on the statute can best be stated after a brief review of the constitutional flaws of this aspect of Alabama's statute.

1. The Due Process Violation

Perhaps most saliently, the statute violates due process of law, by undermining the Constitutional guarantee of proof beyond a reasonable doubt. The requirement that a state not impose criminal sanctions unless it has proved every element of the charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), is so basic that it is common knowledge among the people of the United States. Indeed the centrality of the "beyond a reasonable doubt" standard to criminal jurisprudence was recognized by the Supreme Court twice last term. Jackson v. Virginia, 99 S.Ct. 2781, 2787 (1979); Addington v. Texas, 99 S. Ct. 1804, 1808 (1979). In preventing juries from returning verdicts on lesser included offenses, the Alabama

capital punishment statute denigrates the "vital role" played by the standard of proof beyond a reasonable doubt by encouraging juries to convict in spite of it. Concomitantly, the statute reduces the "risk of error" that should be borne by society by placing it squarely on the shoulders of capital defendants.

It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which a significant number of Alabama capital juries must inevitably be thrust by their statutory inability to return a verdict on a lesser included offense. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater. This is precisely why virtually every American jurisdiction entitles a defendant to request a lesser included offense instruction if there is any evidence to support it. In the context of a murder trial, the natural human revulsion to all homicides only serves to heighten a jury's disinclination to declare an individual it believes has unjustifiably killed "not guilty."

Were common sense and simple logic not sufficient to compel this conclusion, this Court's judgment confirming it and Alabama's own experience in administering its death penalty statute certainly are. In Keeble v. United States, 412 U.S. 205 (1973), the court overturned a trial court's interpretation of a statutory system, which had precluded the giving of a jury instruction on a lesser included offense. Holding that this system, the federal Major Crimes Act, could not be construed to preclude a lesser offense instruction, the Court reasoned that a contrary construction would raise difficult constitutional questions. Id. at 213. It would expose defendants to a substantial risk of unwarranted conviction:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-213 (emphasis in original).[7/]

Alabama's experience administering its capital punishment statute confirms that the Supreme Court's concern over the intolerable pressure brought to bear on a jury powerless to convict of a lesser offense was not unfounded. Since the effective date of the Alabama statute, the resulting conviction rate has been so startling that it can only be described as a veritable march to death row. During the first 33 months of the law's operation, Alabama prosecutors attained a 96 percent conviction rate in capital cases where the defendant pled not guilty and an 86 percent death sentence rate where the jury rendered a verdict of guilty and the issue of punishment was contested. These statistics deviate starkly from the expected norm found by the Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.) (hereinafter "Joint Opinion"): "Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20 percent of the cases."

7/ The lower courts have also recognized that foreclosure of a lesser offense instruction, where otherwise appropriate, jeopardizes a defendant's fundamental right to fair jury factfinding. See, e.g., United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied, 435 U.S. 995 (1978); Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D.Pa. 1968), appeal dismissed, 425 F.2d 267 (3d Cir. 1970).

Indeed, it is settled in federal practice that a defendant is entitled to a charge on available lesser included offenses at his request, if there is evidence to support the charge. 8A Moore's Federal Practice ¶ 31.03[1] at 31-15 (2d ed., Sept. 1978 revision).

Although the wholly alien results achieved under the Alabama statute do not, standing alone, compel the invalidation of the statute, they do highlight the constitutionally unacceptable manner in which the statute must be working and underscore the need to overturn it.[8/]

2. The Equal Protection Violation.

Of all Alabama's criminal defendants, only those charged with a capital offense are denied the protection of a lesser included offense instruction. Consequently, capital defendants must defend not simply their liberty, but their very lives, without an important procedural safeguard afforded every other Alabama defendant -- a safeguard integral to fostering jury faithfulness to the standard of proof beyond a reasonable doubt. The lesser offense preclusion of Alabama's death penalty statute thus infringes upon two rights: the right to life and the right to unprejudiced jury fact-finding on the issue of guilt.

Both of these rights are "fundamental"; that is, they are "explicitly or implicitly guaranteed by the Constitution." San Antonio Indpdt. School District v. Rodriguez, 411 U.S. 1, 33-34 (1973). The right of all persons to life is explicitly guaranteed in the Fifth and Fourteenth Amendments. The right of an accused to unprejudiced jury fact-finding is implicit in the Due Process Clause. In re Winship, 397 U.S. 358 (1970); Cf. Keeble v. United States, 412 U.S. 205 (1973).

Because of its discriminatory impact on these fundamental rights, Alabama's capital punishment statute must be strictly scrutinized to determine whether it is "necessary to promote a

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8/ Alabama's preclusion of jury consideration of lesser included offenses also deprives a capital defendant of the right to trial by jury guaranteed him by the Fourteenth Amendment's Due Process Clause. Duncan v. Louisiana, 391 U.S. 145 (1968). Where a legislature recognizes that different degrees of criminality -- and different punishments-- should attach to the same basic act (here the killing of another human being), and that those differences turn on factual determinations, the power to determine that the facts warrant conviction only of a lesser offense cannot, without the defendant's approval, be taken from the jury.

compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See also Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-343 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972).

The only interest that Alabama has asserted in support of the statute's preclusion of lesser offense instructions is the need to comply with the Supreme Court's ruling in Furman by controlling undue jury discretion and nullification in capital cases.[9/] This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns Furman expressed for consistent capital sentencing could be satisfied by capital punishment statutes that permit juries to consider lesser included offenses.[10/] The death penalty laws of Georgia, Florida and Texas upheld in those cases clearly demonstrate that there is a "less restrictive means" available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution. See Dunn v. Blumstein, supra, 405 U.S. at 343; Zablocki v. Redhail, supra. Accordingly, Alabama's preclusion of lesser included offense verdicts only in capital cases violates the Equal Protection Clause.

3. The Eighth Amendment Violation.

Gregg and its companion cases establish that under the Eighth Amendment, the constitutionality of the death penalty for murder cannot be evaluated apart from the procedures leading to its imposition. As we have shown, Alabama's practice of barring

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9/ Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama, No. 78-5696 (October Term, 1978), at 24.

10/ Gregg v. Georgia, 428 U.S. 153, 163, 199 (1976) (Opinion of Stewart, Powell and Stevens, JJ.) (hereinafter Joint Opinion); Proffitt v. Florida, 428 U.S. 242, 254 (1976) (Opinion of Stewart, Powell and Stevens, JJ.) (hereinafter Joint Opinion); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Opinion of Stewart, Powell and Stevens, JJ.) (hereinafter Joint Opinion).

jury consideration of lesser included offenses in capital cases subverts the fact-finding process and undercuts the standard of proof beyond a reasonable doubt. Far from being inconsequential, these deficiencies have resulted in conviction and death sentence rates that are nothing short of astounding.

The uniqueness of Alabama's lesser offense preclusion is perhaps the most eloquent testimony to its unfairness. Other states were no doubt deterred from incorporating a similar provision into their own capital punishment statutes by their anticipation of the likely response of jurors to it -- an anticipation that Alabama's experience has proved deadly accurate.[11/] Both the avoidance by every other state of the lesser offense preclusion and its unpopularity with jurors are highly significant under the Eighth Amendment, for "legislative enactments and jury determinations" are substantial indicia of "contemporary standards regarding the infliction of [capital] punishment." Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (Joint Opinion).

In contrast with the overwhelming evidence that Alabama's lesser offense preclusion does not comport with "contemporary standards of decency,"[12/] there is virtually no evidence -- and Alabama has offered none -- of societal acceptance of a capital punishment scheme that, like Alabama's, tells juries they must either kill a defendant or set him free. Alabama's statute is thus invalid under the Eighth Amendment.

4. The Basis for Reviewing the Facial Validity of the Statute.

This Court has firmly adhered to a "traditional rule" in constitutional adjudication, which requires that litigants base their pleas solely on injury to their own rights. The Court has,

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11/ Jurors' reaction to this statute is poignantly illustrated in Justice Jones' dissent in Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, 59 L.Ed. 2d 83 (1979), in which he quotes excerpts from the voir dire of the jury in that case. Id. at 649.

12/ Woodson v. North Carolina, 428 U.S. 280, 294-295 (1976) (Joint Opinion).

however, recognized exceptions to this rule. In so doing, it has acted on "the most 'weighty countervailing considerations.'" Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). Those considerations are present here.

The most significant factor is, of course, that lives hang in the balance.

> [D]eath is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (Plurality Opinion). Because of this quantitative and qualitative difference between death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Joint Opinion). Accordingly, "[w]hen a defendant's life is at stake, the [Supreme] Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187(1976)(Joint Opinion).

It cannot be said that Alabama's death penalty statute requires every safeguard to be observed. Its defects, as outlined above, are profound. Death penalty defendants are singled out for trial under procedures which "stack the deck" against them, procedures which are subject to challenge on due process, equal protection and eighth amendment grounds. These elements of the statute so undercut the rationality of the sentencing process that they assure that almost any decision can be, or appear to be, infected with "caprice or emotion."

Assuming, arguendo, that some individuals sentenced under a statutory scheme as flawed as this one may be sentenced without caprice or emotion, it might be said that the statute, as applied in those cases, should not be overturned. The surface logic of this proposition is belied by the impossibility of identifying which individuals were properly sentenced. Precisely because the statute is so skewed, no reviewing Court will ever be able to conclude that a particular defendant's conviction was free of caprice. A reviewing court may decide that a particular defendant could have properly been convicted and sentenced to death, but it will not be able to say that the jury and judge who in fact adjudicated the defendant's case were reasoning in a constitutionally acceptable manner. Surely a conviction which might well have been premised on any one of several theories, one of which is unconstitutional, cannot stand. Every case arising under this staute will be in precisely this posture.

Petitioner does not suggest that a death penalty statute is unconstitutional merely because it is capable of unconstitutional application, for no statute could escape such a proscription. Particularly in this sensitive field, however, it is essential that the courts assure that the statutes under which individuals may be executed are fundamentally sound, in addition to scrutinizing any individual claims of improper application. Broadly speaking, this has been the courts' practice throughout this decade's reconsideration of the constitutionality of the death penalty.[13/] This practice should

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13/ The courts have followed this course in other fields as well. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel required whenever imprisonment imposed); Miranda v. Arizona, 384 U.S. 436 (1966) (establishing uniform safeguards against violation of Fifth Amendment rights); cf. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (holding vagrancy statute unconstitutionally vague because of its lack of fair notice and encouragement of "arbitrary and erratic arrests and convictions").

continue, and should entail a consideration by this Court of the facial validity of Alabama's bizarre preclusion of consideration of lesser-included offenses.

B. The Role Alabama Has Assigned the Jury, Compelling It to Impose a Death Sentence Upon Every Defendant Convicted of a Capital Crime While Precluding It From Considering Mitigating Circumstances, Raises Substantial Questions Under the Eighth and Fourteenth Amendments.

Section 13-11-2(a), Code of Alabama (1975), mandates that if the jury finds a defendant charged with any of the enumerated offenses guilty, "it shall fix the punishment at death." (Emphasis added.) The statute thus forces the jury in a capital case to view itself as a sentencing authority and contemplate the enormity of the consequences of a guilty verdict while simultaneously denying the jurors any lawful channel by which to give substance to those considerations that must necessarily affect any rational human being's decision that one of his fellows must live or die. Alabama's expectation that its capital juries can disregard the ostensibly lethal consequences of a guilty verdict in determining guilt or innocence is unconstitutionally unrealistic. Its insistence that its capital juries approve a death sentence they have been statutorily precluded from properly evaluating perpetrates an unconstitutional charade. Quite simply, the Alabama statute encourages the most constitutionally infirm aspect of jury participation in a capital sentencing scheme -- "unguided and unchecked jury discretion," Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion) -- while denying the jury an opportunity to perform its most constitutionally compelling function in capital cases -- "maintain[ing] a link between contemporary community values and the penal system," Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). This compounded misuse of the jury violates the Eighth and Fourteenth Amendments.

Prior decisions of this Court repeatedly emphasized the importance of the avoidance of unbridled jury discretion. See Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 334-35 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter "Joint Opinion"); Furman v. Georgia, 408 U.S. 238, 257

(1972)(Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 313 (White, J., concurring).

As detailed in the joint opinion in Woodson, a review of the history of the administration of capital punishment statutes in this country convincingly establishes that when forced to determine guilt or innocence under a statute that seemingly makes death a necessary consequence of conviction,[14/] American juries "have, with some regularity, disregarded their oaths and refused to convict. . . ." 428 U.S. at 293.

Such juror lawlessness would appear to be inevitable under the Alabama statute since § 13-11-2 compels a jury that has found a defendant guilty of a capital crime "to fix the punishment at death." Faced with the prospect of being required to order the termination of lives they believe should be spared, Alabama juries can be expected to refuse to convict some unquestionably guilty defendants, even if infrequently. Ironically, other juries, as already noted, can be expected to convict defendants whom they do not believe to be guilty of capital murder, so as to avoid their escaping all punishment. The interplay between these two features unquestionably generates the unguided and unchecked jury discretion condemned in Woodson.

The arbitrariness of the jury's actions is aggravated both by the absolute absence of guidelines for its decision, Jacobs v. State, 361 So.2d 640, 643 (Ala. 1978), cert denied, 59 L.Ed.2d 83 (1979), and by the paucity of information on which the jury must act. Aggravating and mitigating circumstances, under Alabama law, are considered by the trial judge at a post-verdict sentencing hearing. The jury fixes its sentence at death when it decides the accused's guilt. Thus

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14/ Because both federal and state governments have, since the country's inception, provided the opportunity for executive clemency, see Gregg v. Georgia, 428 U.S. 153, 199-200 n.50 (Joint Opinion); Schick v. Reed, 419 U.S. 256 (1974); Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978) cert. denied, 59 L.Ed.2d 796 (1979), it is doubtful that any American capital punishment law has been mandatory in any absolute sence. What is, therefore, crucial in assessing whether a death penalty statute operates in a constitutionally impermissible manner is the jury's perception of the consequences the statute attaches to its decisions.

Alabama, while compelling its juries to place their imprimatur on all capital sentences, requires them to do so on a record often or always lacking "essential . . . information about the individual defendant[s] whose fate [they] must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976)(Opinion of Stewart, Powell, and Stevens, JJ.) ("Joint Opinion"). The jury's role in sentencing is reduced to an ill-informed and unreviewable exercise of its power to affect sentence by skewing the decision on guilt.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. Whether Alabama's juries have no real sentencing role at all, as this argument would have it, or have a lawless and arbitrary role, as logic suggests, Alabama's statutory scheme starkly presents the substantial question of the constitutionality of imposing the death penalty without meaningful, lawful participation by the community through the medium of the jury.[15/] Because the Eighth Amendment's meaning is informed by "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), and because juries "express the conscience of the community on the ultimate question of life or death," Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), Alabama's system is, for this reason as well as the others outlined here, unconstitutionally flawed.

The post-jury-verdict judicial hearing, moreover, is far from a meaningful check on the arbitrariness of the jury's sentencing role. The existence of the post-verdict hearing can hardly improve the jury's decisionmaking, since Alabama law makes no provision for informing the capital jury of the trial judge's role in sentencing. If jurors do become aware of the judge's role, their sence of accountability is if any-

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15/ One formulation of this question was included in the grant of certiorari, but not ultimately decided, in Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

thing likely to be attenuated. The entire sentencing process is thereby made less responsible, not more reliable.

Nor will the judge's review be a reliable safeguard if the jury's decisionmaking has not been adequate. The community pressure on the court not to overturn a jury-fixed sentence of death will be substantial.[16/] The statute itself, moreover, permits the trial court to sentence a capital defendant to life imprisonment without parole only if, "after weighing. . . the fixing of the punishment at death by the jury," the judge "refuse[s] to accept the death penalty as fixed by the jury." Ala. Code § 13-11-4 (1975). Finally, the trial judge does not review the jury's verdict in any meaningful sense. He has no more capability than his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's] power. . . ." Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(Joint Opinion). If the jury votes for death, the trial judge may choose to supersede it; but his choice cannot be made upon the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent in Jacobs v. State, 361 So.2d 640, 650 (Ala. 1978), "the judge's subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed."

C. Alabama's Procedure of Deferring the Trial Judge's Consideration of Aggravating and Mitigating Circumstances Until After the Jury Has Mandatorily Imposed a Sentence of Death Infringes a Capital Defendant's Right to Unprejudiced Sentencing in Violation of the Eighth and Fourteenth Amendments.

It is clear that "in capital cases the fundamendal respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North

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16/ See Section I.C. infra.

Carolina, 428 U.S. 280, 304 (1976). It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Any capital sentencing procedure, then, must assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and must comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968). Alabama's sentencing process fails on both counts.

An Alabama trial judge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced -- and publicized -- which sentences the defendant to die without consideration of mitigating circumstances. The judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocence by publicly proclaiming that the defendant is guilty and that a trial will now be held to determine whether he should be found guilty.

Indeed, Alabama's death sentencing procedure is worse, because the pre-announced verdict of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death -- standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," Jurek v. Texas, 428 U.S. 262, 271 (1976)(Joint Opinion). The resultant pressure has already been felt. Justice Jones, in dissent in Jacobs v. State,

361 So.2d 640, 650 (Ala. 1978), took note of the "outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death." See id. at 650-51 n.3.[17/] A procedure which compels the judge to place himslef in a publicly infavorable light in order to do his minimal constitutional duty[18/] is too fraught with peril to be permitted consistently with due process,[19/] and too unreliable to pass Eighth Amendment muster.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. As noted in Section I.B., supra, the trial judge is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury," § 13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, 391 U.S. 510, 523 (1968), results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion).

17/ Alabama judges -- both trial and appellate -- are elected. Ala. Const., Art. 6.13, as amended by Amendment No. 328. They are thus not likely to be completely insensitive to this "outcry." Yet this system's decisions can only be valid where individual judges are able to ignore such criticism. It is disturbing, therefore, that only two judges were responsible for five of the seven cases in which (as of May, 1979) death sentences had been reduced to life imprisonment.

18/ Such a process embroils the judge in the passions of the day and forces him to "assume primary responsibility in chossing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

19/ Cf. Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See also Gardner v. Florida, 430 U.S. 349, 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner . . . However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed."); Johnson v. Mississippi, 403 U.S. 212 (1971); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Because of the pressures brought to bear on the sentencing process, it is essential that the capital defendant be protected at this stage by a proper burden of proof. As Gardner v. Florida, 430 U.S. 349 (1977), and Presnell v. Georgia, 99 S. Ct. 235 (1978), have demonstrated, the "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Id. at 236-37. It would seem that the standard of proof beyond a reasonable doubt, which In re Winship, Addington v. Texas, and Jackson v. Virginia have all deemed basic to criminal due process, should accordingly apply in full force to determinations made during the sentencing phase of a capital case.[20/]

Alabama's statute, however, merely requires that a trial judge who fixes the punishment at death list "one or more of the aggravating circumstances . . . which it finds exists," and "[a]ny of the mitigating circumstances . . . which it finds insufficient to outweigh the aggravating circumstances." Ala. Code § 13-11-4(1975). The state courts have not construed this statute to require proof beyond a reasonable doubt.[21/] This failure would be a basis for certiorari in its own right, but it is particularly significant in light of the other flaws in the Alabama sentencing process.

20/ The Georgia, Florida and Texas statutes which were upheld by the Supreme Court all require proof of aggravating circumstances beyond a reasonable doubt, either by their own terms or by interpretation of the highest appellate court of the state in question. See Gregg v. Georgia, 428 U.S. 153, 166 n.9 (Joint Opinion); Jurek v. Texas, 428 U.S. 262, 269 (Joint Opinion); Spinkellink v. Wainwright, 578 F.2d 582, 610 (5th Cir. 1978), cert. denied, ____ U.S. ____ (1979).

21/ The state court decisions addressing the burden of proof question are elusive at best, see, e.g., Kyzer v. State, ___ So.2d ___, 6 Div. 655, manuscript opinion at 13-15 (Ala. Crim. App. August 21, 1979).

D. Alabama's Use of "Heinousness" as an Aggravating Circumstance Raises Substantial Questions Under the Eighth and Fourteenth Amendments.

Alabama's death penalty law directs the trial court to consider, as one of the eight possible aggravating circumstances defined in the statute, whether "[t]he capital felony was especially heinous, atrocious or cruel." Ala. Code § 13-11-6(8)(1975). This Court has recently granted certiorari to determine whether a similar provision of Georgia law was construed so broadly and vaguely in the case in question as to violate the Eighth and Fourteenth Amendments. Godfrey v. Georgia, 242 Ga. 302, cert. granted, 26 Cr.L. 4053 (October 9, 1979).

The construction of the "heinousness" standard in Alabama justifies a grant of certiorari to consider whether this section of the statute, as construed, is facially valid. Alabama has, to be sure, adopted an interpretation of this provision which at first blush might be taken to narrow its potential scope. Quoting State v. Dixon, 283 So.2d 1 (Fla. 1973), the Alabama Court of Criminal Appeals states that

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Kyzer v. State, -- So.2d ---, 6 Div. 655, Manuscript Opinion at 12 (August 21, 1979); see Jacobs v. State, 361 So.2d 607, 633 (Ala. Cr. App. 1977), aff'd, 361 So.2d 640 (Ala. 1978), cert. denied, 59 L.Ed.2d 83 (1979).

Actual practice under this statute, however, has not restricted "especially heinous" crimes to those which can be set apart from "the norm of capital felonies." Instead, it appears that in Alabama the normal capital felony is found to be especially heinous. The extremely high rate of convictions and death sentences in Alabama has already been noted.[22/]

22/ See page 11 supra.

Petitioner's counsel have reviewed the opinions of the Court of Criminal Appeals in 33 cases arising under Alabama's death penalty statute. Seven of these opinions, including two in cases where the death penalty had not been imposed, did not state which aggravating circumstances had been found by the trial courts. In the twenty-six remaining cases, the trial courts had found heinousness in twenty.[23] In another, the trial court found the victim had been cruelly beaten and apparently this was taken to be a finding of this aggravating circumstance.[24] In two others, the trial court had commented that it considered the killing heinous, but that it would not find heinousness as an aggravating circumstance because of the absence of precedential guidance.[25] In another, the trial court found as a fact, and possibly intended as an aggravating circumstance, that the killing was particularly "senseless" and "uncalled for."[26]

These figures strongly suggest that this aggravating circumstance is in fact being found by the trial courts in the normal capital case. Nor has appellate review - despite the correction of such blatant errors as equating "heinous" with "unnecessary"[27] -- checked this tendency to translate natural revulsion against murder into an indiscriminate finding of this aggravating circumstance.

23/ These were the cases of Tommy Lewis, Huey Coon, Kelly Colley, Dudley Kyzer, Jesse Morrison, Tim Crawford, Anthony Johnson, J. B. Hubbard, Roger Thomas, Thomas Whisenhant, Woodrow Wilson Keller, Charles Bracewell, Herbert Richardson, Roy Frank Clements, Gilbert Beck, Billy Ray Williamson, John L. Jacobs, Jerry Wayne Jacobs, Edward Horsly and petitioner Brian Keith Baldwin.

24/ Mack v. State, -- So.2d ---, 3 Div. 869, Manuscript Opinion at 49 (Ala. Cr. App. January 30, 1979)(After Remandment); see id. at 52 (Bookout, J., dissenting).

25/ The defendants in these cases were John Evans and Wayne Ritter. Evans and Ritter v. State, 361 So.2d 654, 663, 665 (Ala. Cr. App. 1977).

26/ Wilson v. State, 371 So.2d 932, 936 (Ala. Cr. App. 1978), aff'd, 371 So.2d 943 (Ala. 1979).

27/ Colley v. State, ___ So.2d ___, 4 Div. 648, Manuscript Opinion at 22-23 (Ala. Cr. App. Sept. 4, 1979).

E. Alabama's Failure to Provide a System of Comparative Review of Sentences and to Empower Its Appellate Courts to Vacate Death Sentences in Appropriate Cases Raises Substantial Questions Under the Eighth Amendment

In order to pass constitutional muster, a death penalty sentencing scheme must eliminate the arbitrary and capricious application of the death sentence. An important component of a reliable, and thus constitutionally acceptable, sentencing scheme is "prompt judicial review of the [sentencing] decision in a court with state-wide jurisdiction . . . [as] a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (1976) (Joint Opinion). This appellate review is constitutionally necessary to "assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976) (Joint Opinion), and "to ensure that [death sentences] are consistent with other sentences imposed in similar circumstances," Proffitt v. Florida, 428 U.S. 242, 253 (1976) (Joint Opinion).

In its 1976 decisions, this Court observed that in the context of reviewing capital cases, two distinct features of appellate review assume special significance. First, the Court noted with approval that both the Georgia and Florida schemes provided for the comparative review of death sentences to determine "whether the [death] sentence [in each case] is disproportionate compared to those sentences imposed in similar cases," Gregg v. Georgia, 428 U.S. 153, 198 (1976) (Joint Opinion);[28/] Proffitt v. Florida, 428 U.S. 242, 251 (1976)

28/ The Georgia appellate scheme for comparative review is extensive. See Gregg v. Georgia, 428 U.S. 153,166-68 (Joint Opinion); id. at 223-24 (White, J., concurring). The court is required to compare "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Id. at 198.

(Joint Opinion).[29/] Second, the Court attached constitutional importance to the power of state appellate courts to vacate death sentences in cases where they affirm the conviction. As the Supreme Court noted in Proffitt (428 U.S. at 253):

> The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.

When the Alabama appellate review system in death cases is measured by these benchmarks, it falls far short of the constitutional standard. The Alabama death statute does not empower Alabama courts to exercise comparative proportional appellate review or to vacate a death sentence in a case where the conviction is fair but where the death sentence imposed is excessive, arbitrary or disproportionate when compared to the sentence in other cases. As the Court of Criminal Appeals noted recently, "this Court does not have the statutory authority to reduce the penalty and resentence the appellant itself." Lewis v. State, 4 Div. 611 (Alabama Court of Criminal Appeals, September 4, 1979).

The court's statement of its practice was correct, for in over 30 opinions under Alabama's new death penalty statute it has not reduced or vacated any, though in a limited number it has remanded for written factual findings and/or new sentencing hearings. The Alabama Supreme Court similarly has not asserted or exercised a power to reduce or vacate sentence. Without this

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29/ As the Supreme Court noted in Proffitt v. Florida, 428 U.S. at 258-59 (Joint Opinion), the Florida Supreme Court has adopted, without statutory requirement, a comparative proportionality review similar to that of Georgia Although the Supreme Court did not allude to any mechanism for the comparative review of death sentences in Jurek, at the time Jurek was decided only two cases had worked their way through the Texas appellate system, Jurek v. Texas, 428 U.S. 262, 270 (Joint Opinion). The Court simply refused to assume that Texas' system of appellate review would work in an unconstitutional manner. In Alabama, on the other hand, the evidence is in. And it does show that Alabama's appellate courts do not engage in comparative review.

power, the appellate courts of the state have no effective means of assuring proportionality of sentences. The opinions of both the Court of Criminal Appeals and the Supreme Court reflect, moreover, that these courts view their role as the correction of error,[30/] rather than a comparative review.

F. The Overall Operation of Alabama's Death Penalty Statute Is So Prejudicial To The Rights Of A Capital Defendant At Both The Guilt And Sentencing Stages As To Raise Substantial Questions Under Both The Eighth Amendment's Cruel And Unusual Punishment Clause And The Due Process Clause Of The Fourteenth Amendment.

Although the Supreme Court's pronouncements governing the procedures a State must follow before it can constitutionally deprive a citizen of his life "have not ... always been easy to decipher," Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion), one principle has remained unchanged, unchallenged and impregnable: "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 521-22 n.20 (1968). In enacting the death penalty statute challenged here, Alabama has not fulfilled its obligation to keep the scales of justice true. Instead, with a hand that grows increasingly heavy at each successive stage of a capital case, Alabama plunges the balance -- and the defendant whose life is dependent upon it -- toward death. Each of the constitutional flaws described above compounds the effect of the others. The result is that neither trial jury nor trial judge, nor the appellate courts, is an effective bulwark against the irrational application of the death penalty.

For those defendants a prosecutor decides to charge with a capital crime, the Alabama death penalty statute is a veritable engine of death. Under the Eighth Amendment, it is this Court's duty to dismantle it.

30/ See, e.g., Cade v. State, 4 Div. 640, Manuscript Opinion at 43 (Ala. Cr. App. November 21, 1978).

II. On Its Face, and As Applied to Petitioner, the Alabama Death Penalty Statute's Specification of Aggravating and Mitigating Circumstances Raises Substantial Questions Under the Eighth and Fourteenth Amendments.

Lockett v. Ohio has removed any possible doubt that valid death penalty statutes must permit the sentencing authority to consider and give independent mitigating weight to any aspects of the defendant's character and record, and to circumstances of the offense, proffered in mitigation.[31/] Although the Alabama Supreme Court has confirmed that "any matter that the court deems relevant to sentence" may be put in evidence at the sentencing hearing,[32/] the statute specifies seven mitigating circumstances,[33/] and it would seem that these are the only mitigating circumstances which a trial court may find, regardless of the evidence before it.[34/]

Whether or not the statute can be construed to comport with Lockett, however, it plainly was not so applied in petitioner's case. The trial judge permitted peritioner to proffer any evidence which he wished, but after petitioner had in fact proffered considerable evidence the court found only the mitigating circumstance specifically authorized by statute -- petitioner's age. Petitioner had testified that he left home when he was thirteen because he could not get along with his father. (R.255) His testimony, and his counsel's representations, left little doubt of his family's utter disinterest in him, nor of the family's failure to guide its children into lawabiding life. (R.256-57; 263-64). Neither the prosecution nor the trial court suggested that this testimony was unworthy of belief, but the facts established by it were not reflected in any finding of a mitigating circumstance.

31/ Lockett v. Ohio, 438 U.S. 586, (1978).

32/ Jacobs v. State, 361 So.2d 640 (1978), cert. denied, 59 L.Ed.2d 83 (1979); Ala. Code § 13-11-3 (1975).

33/ Ala. Code § 13-11-7(1)-(7) (1975).

34/ See Jacobs v. State, 361 So.2d 640 (Ala. 1978) (Torbert, C. J., concurring); In re Cook v. Alabama, 369 So.2d 1251, 1256 (Ala. 1978)(plurality opinion).

The crime was a terrible one. Nevertheless, the trial court, presumably acting in accordance with its understanding of Alabama's statute, did not give independent mitigating weight to aspects of the defendant's character which properly should have been so considered.

CONCLUSION

For the reasons set out in this petition, certiorari should be granted to consider the constitutionality of Alabama's death penalty statute, both on its face and as applied.

Respectfully submitted,

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1001 South Hull Street
Montgomery, AL 36104
205/264-0286

ATTORNEYS FOR PETITIONER

THE OPINION IN BALDWIN V. ALABAMA HAS NOT BEEN FILMED. IT CAN BE FOUND AT 372 So. 2d 32.

STATE OF ALABAMA	)	IN THE CIRCUIT COURT FOR
	)	
vs.	)	MONROE COUNTY, ALABAMA.
	)	
BRIAN KEITH BALDWIN Defendant	)	CASE NO. CC-77-51

MOTION FOR NEW TRIAL

Now comes the defendant in the above styled cause, by his attorney, and moves the Court to set aside the verdict in this cause rendered on August 9, 1977 and the judgment of the Court rendered thereon on September 9, 1977 and to grant to the defendant a new trial and as grounds for said motion sets out the following:

1. For that the verdict of the jury was contrary to the evidence in the case.

2. For that the Court erred in refusing to grant the defendant's motion to strike or exclude the State's evidence at the time the State rested its case.

3. For that the State failed to prove the material allegations of the indictment.

4. For that the overwhelming weight of the evidence revealed that the robbery, if any, occurred outside the jurisdiction of this Court.

5. For that the Alabama capital sentencing procedures are violative of the Eighth and Fourteenth Amendments to the

United States Constitution because they fail to assure that the death penalty will not be imposed in an arbitrary or capricious manner and do not comport with due process.

Wherefore, the defendant prays that the verdict of the jury and the judgment of the Court rendered thereon be set aside and the defendant be granted a new trial.

FILED

SEP 27 1977

JOHN M. SAWYER
CLERK OF COURT

Windell C. Owens
Attorney for Defendant
Windell C. Owens
Box 428
Monroeville, Alabama 36460

The foregoing motion having been presented to the Court on the 27th day of September, 1977, is hereby set down for hearing on the 7th day of Oct, 1977, at 10:00 a.m.

R. E. E. King
CIRCUIT JUDGE

10/7/77
Submitted and taken under advisement.
R. E. E. King Jr. J.

11/2/77
Motion overruled and denied.
R. E. E. King Jr. J.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when

the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the

aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

13-11-5. Conviction and sentence to death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant' conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participatio was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate th criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

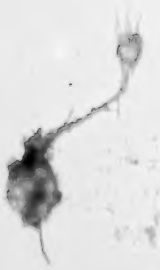
(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under th provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less tha five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-5563

BRIAN KEITH BALDWIN,

Petitioner

v.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

Comes now the State Of Alabama by and through its Attorney General and respectfully asserts that the Petition for Writ of Certiorari is due to be dismissed and that this matter should not be reviewed by this Honorable Court.

STATEMENT OF THE CASE

The petitioner was indicted by a Monroe County, Alabama grand jury for the offense set forth under Code of Alabama 1975, §13-11-2(a)(2).

The facts germane to the petitioner's perpetrated offense, as found by the Alabama Court of Criminal Appeals and cited by the Alabama Supreme Court in its opinion, are found at 372 So.2d 32, 33.

Trial of the petitioner began on August 8, 1977, with the Honorable Robert E. L. Key, Circuit Judge, presiding. Based on the evidence presented, the jury found the petitioner guilty as charged in the indictment and fixed his punishment at death by electrocution.

On September 9, 1977, the court conducted a hearing as required by law to determine whether to sentence the petitioner to death or to life imprisonment without parole. Pursuant to said hearing, the court adjudged and ordered that petitioner suffer death by electrocution.

Pursuant to the law providing automatic appeal of cases wherein a sentence of death is imposed, the case was reviewed by the Alabama Court of Criminal Appeals. The Court of Criminal Appeals affirmed the conviction and sentence in an opinion dated October 3, 1978. (372 So.2d 26).

On January 17, 1979, a Writ of Certiorari to the Court of Criminal Appeals was granted by the Alabama Supreme Court. On June 1, 1979, the Alabama Supreme Court affirmed the decision of the Court of Criminal Appeals. (372 So.2d 32).

On June 14, 1979, present counsel for petitioner motioned the Alabama Supreme Court to be enrolled as counsel of record for petitioner. Said counsel then petitioned the Alabama Supreme Court to suspend the provisions of the Appellate Rules so as to allow petitioner a time extension for filing his petition for rehearing. This motion for suspension of the rules was denied June 20, 1979.

A Judgment and Order For Execution was rendered by the Alabama Supreme Court on July 5, 1979, setting the execution date for petitioner as August 10, 1979. On July 26, 1979, counsel for petitioner made Application For Stay of Execution. The Alabama Supreme Court, in an order dated July 31, 1979, granted a stay of execution allowing petitioner

to seek review in this Honorable Court by August 30, 1979. On August 16, 1979, petitioner's counsel requested an extension of time in which to file petition for writ of certiorari. Said extension was granted via on order signed by Mr. Justice Rowell, extending time for filing of said petition to and including October 29, 1979.

REASONS FOR DENYING THE WRIT

Petitioner raises two basic allegations challenging the constitutionally validity of Alabama's death penalty statute: (1) the juries in capital cases are precluded from considering lesser included offenses resulting in a capital defendant being denied due process and equal protection; (2) the Alabama death penalty statute's specification of aggravating and mitigating circumstances results in a conflict with the mandates set forth in Lockett v. Ohio, 438 U.S. 586 (1978). Ancillary to (1) as stated above, petitioner attacks the role of juries and judges under Alabama's death penalty statute, questions the propriety of "heinousness" as an aggravating circumstance and asserts failure of Alabama to provide a system of comparative appellate review in death penalty cases.

(1) Petitioner contends that Alabama's death penalty statute is unconstitutional because it precludes the trial jury from considering lesser included offenses. On October 9, 1979, this Honorable Court granted certiorari in Gilbert Franklin Beck v. State of Alabama, (United States Supreme Court No. 78-6621). The order granting certiorari read:

> "The petition for a writ of certiorari is granted limited to the question presented by the Court: May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider

a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?"

The Beck case is presently being briefed, and oral argument will probably be scheduled for some time in January of 1980.

The position of the State of Alabama, and of the respondent in this appeal, concerning the preclusion of lesser included offenses is twofold. First, preclusion of a lesser included non-capital offense in a capital case is not unconstitutional even if the evidence at the trial of the case would support a conviction for the lesser included non-capital offense. Second, even if it is unconstitutional to preclude a lesser included non-capital offense in a capital case in which there is a factual basis in the evidence for a conviction for that lesser offense, it is not unconstitutional to preclude a conviction for a lesser included offense when no evidence is presented at the trial of the capital case which would support a conviction for the lesser offense instead of for the capital offense.

The first issue described above will be decided by this Honorable Court in Beck v. Alabama, supra. If the Supreme Court decides that issue in favor of the State of Alabama, then the remaining issue described above need not be decided. If the Supreme Court decides the Beck case adversely to the State of Alabama, then the remaining issue will be presented in this case or other Alabama death penalty cases presently before this Court.

B. The Rule in Non-Capital Cases is That a Jury is Permitted to Consider Lesser Included Offenses Only if There is a Factual Basis in the Evidence for Them

(1) The Federal Rule

As the United States Supreme Court held in Sansome v. United States, 380 U.S. 343, 350 (1965), "A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element

which is not required for conviction of the lesser included offense." Accord, e.g., United States v. Madden, 525 F.2d 972, 973 (5th Cir. 1976); United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976). It is neither necessary nor proper to permit a jury to consider convicting a defendant for a lesser offense unless the jury could rationally find that although all the elements of the higher offense had not been proven all of the elements of the lesser offense had been. E.G., Sansome v. United States, 380 U.S. at 351; Methvin v. United States, 441 F.2d 584, 586 (5th Cir. 1971). The case of Keeble v. United States, 412 U.S. 205 (1973), is not to the contrary, because in that case the defendant's intent to create serious bodily harm was "very much in dispute at trial." 412 U.S. at 213. Since that intent was an element of the higher offense but not of the lesser offense, the Court specifically found that the jury "could rationally" have convicted the defendant of the lesser offense instead of the greater one. 412 U.S. at 213. Absent a factual dispute over the existence of an element necessary only to the higher offense, the result is to the contrary. As the Court said in Sansome v. United States, 380 U.S. at 334-335:

> In sum, it is clear that there were no disputed issues of fact which will justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the [lesser offenses] without having committed a violation of the [higher offense]. This being the case, the petitioner was not entitled to a lesser included offense charge . . .

The rule described is the rule which prevails in the federal courts, but the same rule generally applies in Alabama courts.

(2) The Rule in Alabama

> On p. 8 of petitioner's petition, he states that:
>
> As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with

which he is charged. Alabama Code, §15-7-1 (1975).

That is not correct. Under Alabama law, the general rule is that a defendant is not entitled to have the jury consider a lesser included offense unless under a reasonable theory based upon the evidence the defendant could be guilty of the lesser offense instead of the greater one. E.g., Fulgham v. State, 291 Ala. 71, 277 So.2d 886, 890 (1973) (upholding refusal to instruct on manslaughter in the second degree in a murder case); Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937) (upholding refusal to instruct on larceny and assault and battery in a robbery case); Whitehead v. State, 206 Ala. 288, 90 So. 351, 354 (1921) (upholding refusal to instruct on manslaughter in the first degree in a murder case); Golston v. State, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975) (upholding refusal to instruct on attempted robbery in a robbery case); Harvest v. State, 342 So.2d 1369, 1372 (Ala. Cr. App. 1977) (upholding refusal to instruct on petty larceny in a grand larceny case); Harris v. State, 44 Ala. App. 654, 219 So.2d 410, 413 (1969) (upholding refusal to instruct on grand larceny in a robbery case); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968) (upholding refusal to instruct on lesser included offenses in a robbery case). These cases also establish that where evidence

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Footnote 6 on p. 8 of petitioner's brief implies that Warren v. State, 197 Ala. 313, 319, 72 So. 624 (1916), held that a jury must always be permitted the option of convicting a murder defendant of manslaughter regardless of whether that lesser included offense is supported by the evidence. As Fulgham v. State, supra, and Whitehead v. State, supra, establish, the law in Alabama is that it is not proper to charge a jury in a murder case on manslaughter unless there is an evidentiary basis for such a charge. Indeed, Warren v. State, supra, itself so holds. The portion of that decision which petitioner cites, 197 Ala. at 319, 72 So. at 626, is from the opinion of Justice Mayfield who dissented. As the last part of the decision indicated, 197 Ala. at 348-349, 72 So. at 638, the majority differed from Justice Mayfield and affirmed the trial court's refusal to charge the jury on manslaughter because there was no evidentiary basis for that lesser included offense.

is undisputed, there can be no evidentiary basis for permitting the jury to consider any lesser included offenses. See, e. g., Harris v. State, 219 So.2d at 413; Golston v. State, supra. [1]

There is one and only one exception to the rule in Alabama that lesser included offenses are to be submitted to the jury only if there is an evidentiary basis to support them. That exception is contained in Code of Alabama 1975, §13-1-73 which provides that when a jury convicts a defendant under an indictment for murder in the first degree, the jury must be permitted to determine whether the defendant is guilty of murder in the first or second degree. This special statutory rule, which is an exception to the general rule, means that at the trial of a first degree murder indictment the jury must be instructed on and permitted to convict for second degree murder regardless of whether there is a factual basis in the evidence for that lesser included offense. [2] This special statutory rule applies only to murder indictments and not to capital indictments generally. For example, before Furman v. Georgia, 408 U.S. 238 (1972), robbery was a capital crime in Alabama, Title 14, §415, Code of Alabama 1940 (Recompiled 1958), yet the Alabama courts repeatedly held that it was not proper to permit a jury to consider lesser included offenses in a robbery

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[1] This case law has been codified in Code of Alabama 1975, §13A-1-9(b) (1979 Supp.), which provides that, "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." Section 13A-1-9(b) is part of the new Alabama Criminal Code, adopted in 1977, but applicable only to crimes committed on or after January 1, 1980.

[2] Effective January 1, 1980, section 13-1-73 is repealed and replaced by section 13A-1-9(b) of the new Alabama Criminal Code.

case unless there was some evidentiary basis for convicting on them instead of on robbery itself. E.g., Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968).

Even if the last clause in Code of Alabama 1975, §13-11-2(a), which precludes lesser included offenses in capital cases were to be held unconstitutional and severed from the statute, there would still be no state law requirement that the jury in a capital case be permitted to consider lesser included offenses for which there is no basis in the evidence. Section 13-1-73 would not apply, because that statutory provision is limited by its terms to murder indictments. The Alabama Supreme Court has repeatedly held that the capital felonies which are listed in Code of Alabama 1975, §13-11-2(a) are not crimes of murder and cannot be described or referred to as murder, or capital murder, or even murder under aggravated circumstances. E.g., Clements v. State, 370 So.2d 723 (Ala. 1979); Watters v. State, 369 So.2d 1262 (Ala. 1978); Jacobs (John L.) v. State, 371 So.2d 448 (Ala. 1978). Therefore, it follows that if the preclusion of lesser included offenses clause contained in Alabama's capital punishment statute is held to be unconstitutional and is severed from the statute, then the law in Alabama will be that a jury in a capital case is to be instructed on and permitted to find lesser included non-capital offenses when and only when the evidence provides a factual basis which would support a conviction on the lesser offense instead of on the capital offense. [3]

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[3] If the preclusion of lesser included offenses raised by the evidence is held unconstitutional in Beck v. Alabama, supra, then the question of the severability of the preclusion clause of section 13-11-2(a) will be an issue of Alabama law. E.g., Morey v. Doud, 354 U.S. 457, n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924). If it is determined as a matter of Alabama law that the preclusion clause is severed and the rest of the statute remains, then whether the special rule of section 13-1-73 applies to capital indictments would also be

Therefore, neither Alabama law nor general federal law requires that a jury be permitted to convict on a lesser included offense if there is no factual dispute in the evidence upon which such a conviction can be based. Nor does federal constitutional law require it.

C. The Constitution Does Not Require That a Jury in a Capital Case be Permitted to Consider Non-Capital Lesser Included Offenses for Which There is No Basis in the Evidence

There is significant difference between preventing a jury in a capital case from considering a lesser included offense supported by the evidence and preventing it from considering a lesser included offense which has no basis in the evidence. That difference was recognized by the Supreme Court when it limited its grant of certiorari in Beck v. Alabama, supra, to the constitutionality of not permitting a jury to consider a verdict of guilty on a lesser included non-capital offense "when the evidence would have supported such a verdict." The difference is also recognized by petitioner himself who refers on p. 8 of his brief to the "submission to the jury of lesser included offenses that are supported by the evidence," and to, "lesser included offenses that can factually be found in a capital case." (Emphasis added.)

Petitioner did not cite any case, capital or non-capital, which holds that the constitution requres that lesser included offenses be submitted to the jury when there is no factual basis in the evidence for them. Gregg v. Georgia, 428 U.S. 153 (1976), at least implicitly, holds to the contrary. Under the Georgia capital punishment statute upheld in Gregg,

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a question of Alabama law. See, e.g., Ward v. Illinois, 431 U.S. 767, 772 (1977); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Therefore, the issue of whether a capital jury must as a matter of state law be permitted to convict on lesser included offenses not supported by the evidence would be a question of Alabama law and not a federal issue. If this state law question should be raised by the outcome in Beck v. Alabama, supra, then certification of it to the Alabama Supreme Court might be appropriate. See, e.g., Bellotti v. Baird, 428 U.S. 132 (1976).

"the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence." 428 U.S. at 163. However, the Georgia statute does not require that lesser included offenses be submitted to the jury if they are not supported "by any view of the evidence." The Gregg case is itself an example. Gregg was charged with murder during the course of a robbery. The trial court charged the jury on felony murder, non-felony murder, and on the lesser included offenses of robbery, but it specifically refused to charge on the lesser included offense of manslaughter. 428 U.S. at 160, 215-216. The Supreme Court expressly noticed that the Georgia Supreme Court had upheld the trial court's refusal to instruct the jury on voluntary manslaughter, "since there was no evidence to support that verdict." 428 U.S. at 161, n. 2 (opinion of Stewart, Powell, and Stevens, J.J.). The Supreme Court upheld the Georgia statute and affirmed the judgment of the Georgia Supreme Court. Therefore, Gregg v. Georgia, supra, establishes that it is not unconstitutional in a capital case to prevent jury from considering lesser included non-capital offenses when there is no evidentiary basis for them.

The Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 330 (1976), provided that capital juries must be instructed on the non-capital lesser included offenses of second degree murder and manslaughter "whether or not raised by the evidence." While this was not the reason the statute was held unconstitutional, 428 U.S. at 332, the Roberts plurality did note that such a requirement "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," thereby injecting "an element of capriciousness" and permitting the "arbitrary exercise of the captial jury's de facto sentencing discretion." 428 U.S. at 335 (opinion of Steward, Powell, and Stevens, J.J.).

While the quoted words were spoken in a case involving a mandatory statute, the same concerns exist in regard to the operation of non-mandatory statutes.

According to the latest word from the Supreme Court, in order to comply with Furman, capital punishment procedures should not create "a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). Furman requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more "consistent and rational manner" and so that there will be a meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not imposed. Lockett v. Ohio, supra. Permitting the jury in a capital case to convict for a lesser included non-capital offense which has no basis in the evidence will only serve to promote jury nullification and the kind of de facto sentencing discretion which will cause the death penalty to be inflicted in an arbitrary and capricious manner. Instructing a jury to apply the law and decide the case on the casis of the evidence and then giving them a tool which serves no purpose other than to permit them to disregard the law and evidence is illogical. It does not promote consistent and rational sentencing, but just the opposite. A verdict convicting a defendant of a lesser included offense for which there is no factual basis in the evidence can only be based on caprice or emotion rather than reason. A defendant is not constitutionally entitled to do that.

None of the arguments put forward in petitioner's brief against the preclusion of lesser included offenses supported by the evidence applies to the preclusion of lesser included offenses which have no support in the evidence. Petitioner argues that the preclusion of lesser included offenses denigrates the proof beyong the reasonable doubts standard by encouraging jurors to convict in spite of it.

This argument is explicitly premised upon there being at the trial proof beyond a reasonable doubt of a lesser included offense but not of the capital offense itself. That situation, by definition, does not exist in a case like the present one where there is no factual basis for a jury to find that the defendant was guilty of a lesser offense but not of the greater capital offense. Nor does Keeble v. United States, 412 U.S. 205 (1973), support a contrary conclusion. As was discussed previously, in Keeble there was a factual dispute which provided an evidentiary basis for the lesser included offense, and that basis was specifically recognized by the Supreme Court.

Likewise, the equal protection analysis of petitioner yields an entirely different result when applied to the preclusion of lesser included offenses not supported by the evidence. Not permitting a jury to convict on lesser included offenses not supported by the evidence is not only the general rule in Alabama but also in the federal court. It is true that, until January 1, 1980, Alabama has in effect a special statute requiring that regardless of the evidence juries be instructed on second degree murder in the trial of all non-capital first degree murder indictments. The difference between this rule and the refusal to instruct on lesser included offenses not supported by the evidence in this and other capital cases is justified by the compelling state interest in avoding jury nullification and promoting consistent, rational and non-arbitrary jury sentencing in capital cases.

Petitioner's 8th Amendment argument is based upon the "uniqueness" of Alabama's preclusion of factually supported lesser included offenses. The rule precluding jury consideration of lesser included offenses not supported by the evidence

is not unique. That is the general rule in non-capital cases in this country, and it is the rule in federal courts. Petitioner has cited no cases to validly support the contrary.

The evidence presented at the trial of petitioner, dissimilar to that in Beck, does not factually establish a lesser included offense. Therefore, if Beck is decided adversely to Respondent on the ground upon which certiorari was granted in Beck, such decision would not be dispositive of this case.

(2) Petitioner alleges that Alabama's death penalty statute, by specifying certain mitigating circumstances, is unduly restrictive, and as applied to this petitioner, resulted in a denial of petitioner's constitutional rights. Petitioner contends that those seven mitigating factors set forth in Code of Alabama 1975, §13-11-7, are exclusive, and therefore pertinent consideration of any other mitigating factor. Section 13-11-3 of the death penalty statute provides:

> "In the hearing (aggravation and mitigation), evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received . . ." (Emphasis supplied).

Based on these provisions of the statute, the sentencing authority is not restricted to the seven specifically delineated mitigating factors, but may receive evidence as to any matter relevant to sentence. This interpretation is reflected in the opinions of the Alabama Court of Criminal Appeals and Alabama Supreme Court which hold that the sentencing authority may consider any relevant mitigating factor. Jacobs v. State, 361 So.2d 640 (Ala. 1978); Ex parte Cook, _____ So.2d _____, (Ala., September 15, 1978).

Petitioner's interpretation as to the mandates expressed in Lockett v. Ohio, reflects bifurcated reasoning inconsistent with the actual holding in Lockett:

> ". . . the facts established by it (petitioner's evidence at the sentencing hearing) were not reflected in any finding of a mitigating circumstance." (Emphasis supplied). Petitioner's Brief, p. 30.

No cases are cited by petitioner which have held that the Constitution mandates a finding of mitigating circumstances by the sentencing authority pursuant to the sentencing hearing. Respondent submits that the reasoning of petitioner challenging

the lack of finding of any mitigating circumstance is inconsistent with case law applicable to this issue.

The Respondent further submits that there is no constitutional requirement that the court actually find any mitigating circumstances. In some cases there could even be no mitigating factors present at all.

The constitution requires the court to consider mitigating circumstances, but does not require the court to find mitigating circumstances. For this proposition, we need only to look at the precise language of pertinent case law. In Roberts v. Louisiana, 431 U.S. 633, 52 L.Ed.2d 637, 97 S.Ct. 1993, the Court stated as follows:

> "In Woodson v. North Carolina, 428 U.S. 280, 304, 42 L.Ed.2d 944, 96 S.Ct. 1978 (1976), this Court held that 'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death'." at 52 L.Ed.2d 641. (Emphasis supplied)
>
> ". . .it is essential that the capital-sentencing decision allow for consideration of whatever either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional." 52 L.Ed.2d at 642. (Emphasis added)

And in the case of Lockett v. Ohio, _____ U.S. _____, 46 U.S.L.W. 4981 (July 3, 1978), the majority opinion concludes as follows:

> "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." at 4987. (Emphasis added)

Based on the literal reading of the above cited authorities, the sentencing authority is under no constitutional mandate to find any mitigating circumstances. As the cases read, he is required to consider those relevant mitigating factors, which the sentencing authority in petitioner's case did.

Based on these authorities, the writ is due to be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO.

BRIAN KEITH BALDWIN,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

AFFIDAVIT OF PROOF OF SERVICE

STATE OF ALABAMA MONTGOMERY COUNTY

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama 36130, hereby certify that I have deposited for service three (3) copies of a brief in opposition to petition for writ of certiorari to Stephen J. Elmann and John Caroll, 1001 South Hull St., Montgomery, Alabama 36104, and ten (10) copies to the Clerk of the Supreme Court of the United States.

This the 27th day of November, 1979.

Walter S. Turner

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SWORN to and subscribed before me the undersigned, this the 27th day of November, 1979.

Louise T. Norrell

NOTARY PUBLIC